

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID JOE EDWARDS)	
Claimant)	
VS.)	
)	Docket No. 198,017 & 198,018
KLEIN TOOLS, INC.)	
Respondent)	
Self-Insured)	

ORDER

Claimant asked the Appeals Board to review the February 25, 1997, Award entered by Special Administrative Law Judge William F. Morrissey.

APPEARANCES

Claimant appeared by his attorney, Timothy A. Short of Pittsburg, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Wade A. Dorothy of Lenexa, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

The only issue the claimant requested the Appeals Board to review was the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds as follows:

The Special Administrative Law Judge found that claimant was entitled to permanent partial disability benefits of 33.5 percent based on work disability as determined by the "new act" provisions of K.S.A. 44-510e. The Special Administrative Law Judge averaged a 17 percent loss of claimant's ability to perform work tasks with a 50 percent wage loss to arrive at the 33.5 percent work disability. The claimant disagrees with this work disability finding but only questions the loss of earnings component of the work disability test.

The Award of the Special Administrative Law Judge addresses two separate dates of accident, May 18, 1994, and June 27, 1994. The claimant filed separate Applications for Hearing and the Workers Compensation Division assigned Docket No. 198,017 to the June 27, 1994, accident date and Docket No. 198,018 to the May 18, 1994, accident date. Both of the accidents allegedly caused injury to claimant's low back. The Special Administrative Law Judge found that the appropriate date of accident for the purpose of computing the award was May 18, 1994, the date of the first accident. Neither of the parties questioned the use of May 18, 1994, as the date of accident in this appeal. Also, neither of the parties requested that a separate award be entered for each of the two accidents. Therefore, the Appeals Board adopts the finding of the Special Administrative Law Judge that the award should be computed based on one accident and the appropriate date of accident is May 18, 1994.

Claimant's entitlement to permanent partial disability benefits is determined by the July 1, 1993, amendments to K.S.A. 44-510e. Accordingly, the work disability test contains two components: the loss of a worker's ability to perform the work tasks he performed during the 15-year period preceding the accident and the difference between the average weekly wage the worker was earning preinjury and the average weekly wage the worker is earning post-injury. See K.S.A. 44-510e(a).

The disagreement in this case is confined to the narrow issue of what is claimant's wage loss as a result of his work-related back injuries. The claimant testified by deposition on May 6, 1996, almost two years following the date of accident. Claimant established that at that time he was employed performing light mechanic work earning \$240 per week at a local service station. He indicated that he had started working at the service station about the time his treating physician, orthopedic surgeon David O. King, D.O., released him for light duty. Dr. King also testified in this case and the medical records introduced at his deposition indicated that claimant was released for light duty on March 15, 1995.

The Special Administrative Law Judge found claimant's average weekly wage at the time of his injury was \$876.86 which included overtime and fringe benefit costs. The claimant contends the statute is clear and unambiguous that a worker's wage loss is determined by the difference between the average weekly wage the worker was earning

at the time of injury and the average weekly wage that the worker is earning after the injury. See K.S.A. 44-510e(a). Therefore, the claimant argues that his wage loss component of the work disability test amounts to 73 percent. The Special Administrative Law Judge found that claimant's work tasks loss was 17 percent and neither of the parties disputed that finding. Therefore, when the 73 percent wage loss is averaged with claimant's work tasks loss of 17 percent as required by the statute the claimant contends he is entitled to permanent partial disability benefits based on work disability in the amount of 45 percent.

Instead of utilizing claimant's actual post-injury average weekly wage of \$240, the Special Administrative Law Judge imputed an average weekly wage to the claimant in the amount of \$362. The Special Administrative Law Judge found this weekly wage should be imputed to the claimant because the respondent offered claimant a job within his permanent restrictions that would have paid claimant \$9.05 per hour working 40 hours per week with the same fringe benefits claimant was earning prior to his injury. Therefore, the Special Administrative Law Judge compared the \$362 imputed average weekly wage with claimant's preinjury stipulated average weekly wage without fringe benefits in the amount of \$718.06 and arrived at a loss of earning capacity for the claimant of 50 percent instead of the actual loss of 73 percent.

The Appeals Board finds that the record supports the conclusion that the respondent offered claimant, on July 15, 1996, a job as a grinder that would have paid him \$9.05 per hour for 40 hours per week or \$362 per week. John Ferwalt, Jr., plant manager for the respondent, testified on July 15, 1996, and verified, on that date, respondent was offering claimant the grinder job. The respondent also presented testimony through Lowry Jones, M.D., a board certified orthopedic surgeon in Kansas City, Missouri, who examined the claimant on three separate occasions at the request of the respondent. Dr. Jones reviewed the grinder job description and opined that claimant had the ability to perform that job within the permanent restrictions he had placed on the claimant.

The claimant vigorously argues that the Special Administrative Law Judge erred in imputing the grinder job weekly wage to the claimant for the purpose of determining claimant's loss of earning capacity. In his brief to the Appeals Board, the claimant argues that he doubts whether he can perform the grinding job because of his back injury. Additionally, the claimant contends that although his current service station job pays less and does not provide him with fringe benefits, the service station job offers the claimant more security in the future. Also, the claimant asserts that the service station owner has given him an option to buy the station when the owner retires. The claimant cites a letter dated July 15, 1996, wherein claimant declined respondent's offer as supporting these arguments. The Appeals Board has thoroughly searched the record in this case, including the Workers Compensation Division file, and cannot find this letter. Accordingly, because the Appeals Board review is limited to evidence introduced before the Administrative Law Judge and the claimant's foregoing arguments are not supported by the record, the Appeals Board will disregard these arguments in deciding this appeal.

The claimant goes on to argue that he has not voluntarily taken himself out of the labor market or in any other way tried to manipulate the workers compensation system. Therefore, the policy considerations announced in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995) should not apply to the claimant. The Appeals Board disagrees with the claimant and finds, as it did it in Wollenberg v. Marley Cooling Tower Company, Docket No. 184,428 (Sept. 1995), that a weekly wage should be imputed to the claimant in the calculation of a “new act” work disability where the claimant refused to return to a job for the respondent he could perform within his permanent work restrictions.

The claimant also raises the argument that the testimony of the plant manager, John Ferwalt, Jr., established that the grinding job was only a temporary job because the die shop was being transferred to Chicago and all the employees of the die shop would be laid off. The Appeals Board has reviewed Mr. Ferwalt’s testimony and concludes that his testimony does not support such a finding.

The Appeals Board, therefore, concludes that the wage loss component of the work disability test should be 50 percent as of July 15, 1996, as found by the Special Administrative Law Judge when he imputed the \$362 weekly wage to the claimant. Accordingly, the Appeals Board affirms the Special Administrative Law Judge’s Award that claimant is entitled to permanent partial disability benefits based on work disability in the amount of 33.5 percent.

In conclusion, the Appeals Board notes that claimant’s disability rate changes during certain periods of time after the date of accident of May 18, 1994. However, because this is a post-July 1, 1993, accident, where the disability rate is applied to the number of disability weeks instead of the weekly compensation rate, the total amount of the award remains the same regardless of the disability rate change. Therefore, the Appeals Board affirms the award as computed by the Special Administrative Law Judge without setting out the disability rate changes because such changes have no effect on the total award.

The Appeals Board adopts the findings and conclusions contained in the Special Administrative Law Judge’s Award that are not inconsistent with the findings and conclusions set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey dated February 25, 1997, should be, and is hereby, affirmed in all respects.

All remaining orders of the Special Administrative Law Judge contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy A. Short, Pittsburg, KS
Wade A. Dorothy, Lenexa, KS
Bryce D. Benedict, Administrative Law Judge
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director